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Attorneys for all Defendants

**THE UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA**

Black Donuts, Inc, a California corporation; Jan W. Talbot, an individual; Jeff Magna, an individual; T & T Pasadena, Inc., a California corporation; T & T Thousand Oaks, Inc., a California corporation; T & T Glendora, Inc., a California corporation; Tareq Nasrallah, an individual; Tony Nasrallah, an individual; G & G 2000, Inc., a California corporation; Jerry Riccio, an individual; Greg Minshell, an individual; Manzano, Inc., a California corporation; Kevin Raach, an individual; Chula Vista Tire, Inc., a California corporation; Jeff Yasukochi, an individual; Big Red Tire, Inc., a California corporation; James Park, an individual; Felix Bros, Inc., a business entity unknown; Felix Tires, Inc., a California corporation; Ralph Felix, an individual; Randy Scott, an individual; MDS Enterprises, Inc., a California corporation; Michael J. Sullivan, an individual; Kennedy, Phillips & Gunnell Enterprises No. 66, a California corporation; Paul Fuller, an individual; Gene Renner, an individual; and Rex Weissenbach, an individual,

Plaintiffs,

v.

Case No. 2:10-CV-00454-SVW-SS

DUANE FRESHNOCK, CRAIG MCDONALD, BILL KETCHUM, ART BEAHM, MARVIN HAYES, AND GREG ROQUET'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES

Date: March 1, 2010
 Time: 1:30 p.m.

Honorable Stephen V. Wilson
 Courtroom 6

Complaint filed: December 2, 2009

Trial Date: Not yet assigned

1 Sumitomo Corporation of America, a New
2 York corporation; Big O Tires, Inc., a
3 Nevada Limited Liability Company; TBC
4 Corporation, a Florida corporation;
5 Dwayne Freshknock, an individual; Craig
6 McDonald, an individual; Bill Ketchum, an
7 individual; Art Beam, an individual;
8 Marvin Hayes, an individual; Greg
9 Rocquet, an individual; and Does 1-100,

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Defendants.

1 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD, PLEASE**
2 **TAKE NOTICE** that on March 1, 2010 at 1:30 p.m., or as soon thereafter as the
3 parties may be heard, in Courtroom 6 of the above-entitled court, located at 312 N.
4 Spring Street, Los Angeles, California 90012, defendants Duane Freshnock, Craig
5 McDonald, Bill Ketchum, Art Beahm, Marvin Hayes, and Greg Roquet
6 (“Individual Defendants”) will and hereby do move the Court for an order
7 dismissing each of Plaintiffs’ claims for relief asserted against the Individual
8 Defendants for failure to state a claim upon which relief may be granted under
9 Federal Rules of Civil Procedure 12(b)(6) and 8(a), and, alternatively, for an order
10 dismissing Plaintiffs’ fifth claim for failure to plead with particularity under
11 Federal Rule of Civil Procedure 9 (b).

12 This Motion is based on this Notice of Motion and Motion to Dismiss, the
13 Memorandum of Points and Authorities in Support thereof, and upon such other
14 and further oral and written materials as may be presented at or before the hearing
15 on this matter. This motion is made following the conference of counsel pursuant
16 to L.R. 7-3, which took place on January 22, 2010.

17 DATED: January 28, 2010

SEYFARTH SHAW LLP
ERIC R. MCDONOUGH

18
19 By /s/ Eric R. McDonough
20 Eric R. McDonough
21 Attorneys for all Defendants
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1 **I. INTRODUCTION**

2 Plaintiffs comprise twenty-nine individuals or corporate entities who own
3 and operate Big O Tire franchises throughout California. They sue three corporate
4 entities, six individuals, and 100 doe defendants. This motion is brought on behalf
5 of the six individuals named in the complaint.¹

6 Plaintiffs' complaint is deficient, and each claim should be dismissed. The
7 complaint is entirely vague as to which plaintiff asserts which claim against which
8 defendant. The complaint barely mentions the six defendants sued individually,
9 much less alleges any actionable wrongdoing on their part. The complaint fails to
10 meet the pleading standards of the Federal Rules of Civil Procedure. Moreover,
11 Plaintiffs' claims cannot be maintained as a matter of law against the Individual
12 Defendants.

13 **II. STATEMENT OF FACTS**

14 **A. Parties And Claims**

15 Big O Tires, LLC ("Big O") is a retail tire franchisor with more than 450
16 independently-owned and operated locations in twenty states. Plaintiffs consist of
17 twenty-nine individuals or corporate entities who own and operate Big O
18 franchises. (Compl. ¶¶1-24.)

19 Plaintiffs sue Big O, Sumitomo Corporation of America ("Sumitomo"), and
20 TBC Corporation ("TBC"). TBC is alleged to have wholly owned Big O. (*Id.*
21 ¶26.) Sumitomo is alleged to have acquired TBC in 2005. (*Id.* ¶27.) Plaintiffs
22 also sue six individuals: Duane Freshnock, Craig McDonald, Bill Ketchum, Art
23 Beahm, Marvin Hayes, and Greg Roquet. ("Individual Defendants")² The
24 Individual Defendants are alleged to be current or former employees of Big O. (*Id.*
25 ¶29.)

26 ¹ Because of differences between the respective defendants, this motion is filed
27 concurrently with two other motions filed on Defendants' behalf.

28 ² The complaint and caption misspells the names of defendants Freshnock, Beahm
and Roquet. Further, as indicated in Defendants' Notice of Removal, the
Individual Defendants were fraudulently joined in this action.

1 Plaintiffs assert ten claims against Defendants for: (1) declaratory relief, (2)
 2 breach of written contract, (3) breach of implied covenant of good faith and fair
 3 dealing, (4) interference with prospective business relations, (5) fraud, (6)
 4 negligent misrepresentation, (7) violation of California's Unfair Practices Act –
 5 California Business & Professions Code section 17045 *et seq.* (“UPA”), (8)
 6 negligent hiring, (9) violation of California's Cartwright Act – California Business
 7 & Professions Code section 16700 *et seq.*, and (10) violation of California's Unfair
 8 Competition Law – California Business & Professions Code section 17200, *et seq.*
 9 (“UCL”).

10 **B. The Individual Defendants Are Not Parties To The Franchise**
 11 **Agreements**

12 Plaintiffs “entered into franchise agreements at various times with Defendant
 13 Big O.” (Compl. ¶36). The Individual Defendants are not parties to the franchise
 14 agreements, and Plaintiffs do not allege that they entered into the franchise
 15 agreements with the Individual Defendants.

16 **C. The Complaint Barely References The Individual Defendants Or**
 17 **Apprize Them Of Their Alleged Wrongful Conduct**

18 Plaintiffs' complaint barely references the Individual Defendants. For
 19 example, Freshnock is identified as a party and referenced three other times in the
 20 complaint. (Compl. ¶¶29, 86, 94, 109.) McDonald, Roquet and Hayes are each
 21 identified as parties and are mentioned just two other times in the complaint.
 22 (Compl. ¶¶ 29, 86, 105(b), 109, 113, 114.)

23 Plaintiffs also fail to articulate any cogent theory of liability on the part of
 24 the Individual Defendants. Certain statements and conduct are ascribed to the
 25 Individual Defendants, but Plaintiffs never clarify what conduct is actually the
 26 basis for the claims against the Individual Defendants. Furthermore, certain
 27 Individual Defendants are plainly not alleged to have engaged in any wrongdoing.
 28 For example, Beahm is only alleged to have been present during a meeting.
 (Compl. ¶¶29, 106.) Ketchum is referenced twice in the pleading, and is only
 alleged to have participated in a meeting where he allegedly stated certain

discounts were not retroactive. (Compl. ¶¶29, 106.)

III. LEGAL STANDARD

Under Rule 12(b)(6), the Court may grant a motion to dismiss a complaint or claim where there is either a “lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). The Court also can dismiss a claim where the plaintiff cannot prevail on the facts alleged in the complaint. *Weisbuch v. County of Los Angeles*, 119 F.3d 778, 783 n. 1 (9th Cir. 1997). Further, a complaint that fails to plead claims in compliance with Federal Rule of Civil Procedure 8(a) may be dismissed. *Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673 (9th Cir. 1981); *Ahearn v. City of Palos Verdes*, 2008 WL 1330461, *12 (C.D. Cal. Apr. 9, 2008). Fraud claims that are not pled in conformity with Federal Rule of Civil Procedure 9(b) can also be dismissed. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).

In order to survive dismissal, a plaintiff must proffer “enough facts to state a claim for relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A plaintiff must plead facts that allow a court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, -- U.S. --, 129 S.Ct. 1937, 1949 (2009) “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint... has not ‘show[n]’-‘that the pleader is entitled to relief.’” *Id.* at 1950 (citing Fed. Rule Civ. Proc. 8(a)(2)).

These pleading requirements apply to cases removed from state court. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 452 (1943); *Wajda v. R.J. Reynolds Tobacco Co.*, 103 F.Supp.2d 29, 32 (D. Mass. 2000) (“Even in cases removed from state court, the adequacy of pleadings is measured by the federal rules”).

1 **IV. ARGUMENT**

2 **A. Plaintiffs Do Not Charge The Individual Defendants With**
 3 **Breach Of Contract, Breach Of The Implied Covenant, Or**
 4 **Interference With Prospective Business Relations, Nor Can**
 5 **Plaintiffs Assert Their Declaratory Relief Claim Against The**
 6 **Individual Defendants**

7 Plaintiffs largely plead their allegations collectively against “defendants.”
 8 This pleading tactic is not permitted under Federal Rule 8(a), as discussed below.
 9 Notwithstanding this defect, it is clear that Plaintiffs **do not** assert claims against
 10 the Individual Defendants for: (1) breach of written contract (*see* Compl. ¶172
 11 (alleging claim only against Big O); (2) breach of the implied covenant of good
 12 faith and fair dealing (*see* Compl. ¶177 (alleging claim only against Big O); and (3)
 13 interference with prospective business relations (*see* Compl. ¶181 (alleging claim
 14 only against Big O).)³

15 Further, though Plaintiffs assert their claim for declaratory relief collectively
 16 against “defendants,” Plaintiffs seek a declaration related solely to the terms of the
 17 franchise agreements between them and Big O. (Compl. ¶¶162-170.) As the
 18 Individual Defendants are not parties to the franchise agreements, Plaintiffs have
 19 apparently not asserted the claim against the Individual Defendants. Nor would
 20 there be a justiciable controversy between Plaintiffs and the Individual Defendants
 21 concerning the terms of an agreement to which the latter is not a party. To the
 22 extent the declaratory relief claim has been asserted against the Individual
 23 Defendants, they join in Big O’s motion to dismiss that claim.

24 **B. Each Of Plaintiffs’ Remaining Claims Against The Individual**
 25 **Defendants Should Be Dismissed For Failure To Specify The**
 26 **Basis For Each Individual Defendant’s Liability**

27 Each of Plaintiffs’ remaining claims against the Individual Defendants
 28 should be dismissed because Plaintiffs have not stated the grounds for each
 Individual Defendant’s liability.

³ For their interference claim, Plaintiffs use the term “defendants” in their request for punitive damages. (Compl. ¶184.) To the extent this can be construed as an assertion of the entire claim against the Individual Defendants, the Individual Defendants join in Big O’s motion to dismiss that claim.

1 Rule 8(a) requires a plaintiff to make a “showing [it] is entitled to relief”
 2 against the defendant. Fed. R. Civ. Pro. 8(a)(2). Consequently, in cases involving
 3 multiple defendants, the plaintiff must plead facts showing an entitlement to relief
 4 against *each* defendant to satisfy Rule 8(a). *See, e.g., Gauvin v. Trombatore*, 682
 5 F.Supp. 1067, 1071 (N.D. Cal. 1988) (“Plaintiff must allege the basis of his claim
 6 against each defendant to satisfy Federal Rule of Civil Procedure 8(a)(2)”);
 7 *Cataulin v. Washington Mut. Bank, SFB*, 2009 WL 648921, *2 (S.D. Cal. Mar. 09,
 8 2009) (“Where a plaintiff sues multiple defendants and sets forth multiple causes
 9 of action, he must allege the basis of his claim against each defendant to satisfy
 10 Federal Rule of Civil Procedure 8(a)(2)”) (citation omitted).

11 A pleading that does not differentiate among multiple defendants is
 12 deficient. *See, e.g., Aaron v. Aguirre*, 2007 WL 959083, *16 and n.6 (S.D. Cal.
 13 Mar. 8, 2007) (noting “undifferentiated pleading against multiple defendants is
 14 improper” and ruling allegations that grouped multiple defendants together did not
 15 state claim for interference with contractual relations); *PLS-Pacific Laser Systems*
 16 *v. TLZ Inc.*, 2007 WL 2022020, *10-11 (N.D. Cal. Jul. 9, 2007) (in patent
 17 infringement action, allegations that grouped multiple defendants together did not
 18 “give each named defendant sufficient notice of the particular claims and grounds
 19 for the claims against them” and thus did not satisfy Rule 8(a)(2)).⁴ Rather,
 20 “[s]pecific identification of the parties to the activities alleged is required.”
 21 *Cataulin*, 2009 WL 648921 at *2 (citation omitted)). This is so even if many of
 22

23 ⁴ Even under the more lenient standard predating *Twombly* and *Iqbal*, a plaintiff
 24 was required to allege facts showing entitlement to relief against each defendant.
 25 *See, e.g., Rasidescu v. Midland Credit Mgt., Inc.*, 435 F.Supp.2d 1090, 1098-99
 26 (S.D. Cal. 2006) (“every complaint must, at a minimum, give fair notice and state
 27 the elements of each claim against each defendant”); *Foley v. Bates*, 2007 WL
 28 1430096, *3 (N.D. Cal. May 14, 2007) (“As an initial matter, the court finds that
 the complaint must be dismissed because it fails to put each defendant on notice of
 the claim or claims being asserted against him/her. Plaintiff does not allege his
 specific claims against any specific defendant. Rather, he generally alleges all
 claims against ‘all defendants,’ without identifying which defendant is responsible
 for his alleged injuries. This is an impermissible attempt to sweep all four
 defendants into the lawsuit without making specific allegations as to any”).

1 the same underlying facts apply to each defendant. *See PLS-Pacific*, 2007 WL
2 2022020 at *10-11.

3 A complaint that hardly references a particular defendant and charges all
4 defendants collectively of wrongdoing is inadequate. *See, e.g. Cataulin*, 2009 WL
5 648921 at *2 (complaint did not satisfy Rule 8(a) where it failed to demonstrate
6 “any wrongs by particular defendants, but rather ascribe[d] nearly all allegations
7 collectively to ‘Defendants’” and where moving defendants were not mentioned at
8 all in the complaint, outside of the section identifying the parties); *Augustin v.*
9 *Danvers Bank*, 486 F.Supp.2d 99, 101-02 (D. Mass. 2007) (complaint failed to
10 satisfy Rule 8(a) where there were no “specific allegations pertaining” to the
11 defendant and where the defendant was only listed in the caption and under a list of
12 defendants to whom a particular claim applied).

13 The Individual Defendants are barely mentioned in the complaint, and
14 certain of them are alleged to have done nothing more than attend meetings. (*See,*
15 *e.g., Compl.* ¶¶106, 109.) Furthermore, the complaint’s charging allegations
16 accuse all Defendants collectively of wrongdoing, but fail to articulate the basis of
17 any Individual Defendant’s liability for any of the claims. The Individual
18 Defendants are left to guess as to which conduct they must defend against. Each of
19 Plaintiffs’ remaining claims asserted against the Individual Defendants’ should be
20 dismissed.⁵

21
22 ⁵ Plaintiffs also cannot maintain their remaining tort claims against the Individual
23 Defendants to the extent Plaintiffs premise them upon any contractual obligations
24 arising from the franchise agreement. Such claims would be barred under
25 Colorado’s economic-loss rule, which would apply as the franchise agreement
26 contains a Colorado choice of law provision. (Ex A to Compl. § 29.01.) Under the
27 rule, “a party suffering only economic loss from the breach of an express or
28 implied contractual duty may not assert a tort claim for such a breach absent an
independent duty of care under tort law.” *Town of Alma v. AZCO Constr., Inc.*, 10
P.3d 1256, 1264 (Colo. 2000). For a duty to be “independent” it must arise from a
source other than the contract. *Id.* at 1263. A duty is not independent if also
imposed by the contract. *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 74 (Colo.
2004); *Grynberg v. Agri Tech, Inc.*, 10 P.3d 1267, 1270 (Colo. 2000). Even where
a duty would have been imposed in the absence of a contract, the duty cannot be
independent of a contract that memorializes it. *BRW*, 99 P.3d at 74. The claim
could also not be maintained under California law. *See, e.g., Aas v. Sup. Ct.* (2000)

C. Plaintiffs' Fraud Claim Should Be Dismissed

In addition to being improperly pled as discussed above, Plaintiffs' fifth claim for fraud claim should be dismissed because the claim is not pled with particularity under Federal Rule of Civil Procedure 9(b), nor have Plaintiffs alleged facts from which an inference of *scienter* can be inferred. Additionally, to the extent plaintiff Michael Sullivan seeks to assert claims against defendant Roquet, his claims are time-barred and precluded by the parol evidence rule.

1. Plaintiffs' Fail To Plead Adequately Under Rule 9(b)

Federal Rule 9(b) requires that "[i]n alleging fraud..., a party must state with particularity the circumstances constituting fraud." Fed. R. Civ. Pro. 9(b). Whether direct misrepresentation, promissory fraud, or fraud by omission, a fraud claim pled in federal court must satisfy Rule 9(b). *See, e.g., Yourish v. California Amplifier*, 191 F.3d 893, 994-995 (9th Cir. 1999); *Rasidescu v. Midland Credit Management, Inc.*, 435 F.Supp.2d 1090, 1095 (S.D. Cal. 2006); *Washington v. Baenzinger*, 673 F.Supp. 1478, 1482 (N.D. Cal. 1987). Further, a plaintiff must plead facts explaining why a statement was false when it was made. *Smith v. Allstate Ins. Co.*, 160 F.Supp.2d 1150, 1152 (S.D. Cal. 2001); *see also Miscellaneous Serv. Workers, Drivers, & Helpers, Teamsters Local #427 v. Philco-Ford Corp.*, 661 F.2d 776, 782 (9th Cir. 1981). This compels a plaintiff to plead specific, concrete facts demonstrating contemporaneous falsehood; the plaintiff may not "simply point to a defendant's statement, noting that the content of the statement conflicts with the current state of affairs, and then conclude that the statement in question was false when made." *Smith*, 160 F. Supp. 2d at 1152

Here, Plaintiffs have failed to plead in conformity with Rule 9(b). At a minimum, Plaintiffs must state "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation."

24 Cal.4th 627, 643 ("A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations").

1 *Moore v. Kayport Package Exp., Inc.*, 885 F.2d 531, 541 (9th Cir. 1989). In other
2 words, “the who, what, when, where, and how of the misconduct charged.” *Vess*,
3 317 F.3d at 1106 (citation omitted).

4 Fundamentally, Plaintiffs’ pleading is deficient as they do not differentiate
5 among the various Defendants. (Compl. ¶¶186-89 (making fraud allegations
6 against “defendants” collectively).) “Rule 9(b) does not allow a complaint to
7 merely lump multiple defendants together but requires Plaintiffs to differentiate
8 their allegations when suing more than one defendant and inform each defendant
9 separately of the allegations surrounding his alleged participation in the fraud.”
10 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (citation, alterations,
11 and internal quotes omitted); *McFarland v. Memorex Corp.*, 493 F.Supp. 631, 639
12 (N.D. Cal. 1980) (a complaint “may not rely upon blanket references to acts or
13 omissions by all of the ‘defendants,’ for each defendant named in the complaint is
14 entitled to be apprised of the circumstances surrounding the fraudulent conduct
15 with which he individually stands charged”).

16 Plaintiffs also fail to identify the actual misrepresentations they sue under.
17 They make charges of “numerous misrepresentations” and concealments (Compl.
18 ¶187), but do not specify them. They fail to identify who made the
19 misrepresentations or who had a duty to disclose, but concealed relevant
20 information. Plaintiffs also do not allege who was exposed to the alleged fraud; or
21 the time, place, and manner of the alleged fraud. Further, they do not allege any
22 representation was false at the time it was made.

23 Plaintiffs’ allegations concerning alleged BFF franchise program
24 misrepresentations made to plaintiffs Sullivan and MDS Enterprises are likewise
25 inadequate. Plaintiffs do not identify the specific misrepresentations made or who
26 made them. (Compl. ¶¶119, 186.) Plaintiffs fail to provide any of the other details
27 concerning the alleged fraud. (*Id.*) And they fail to plead facts showing the
28 alleged representations were false when made.

Although Plaintiffs allege defendant Roquet made certain representations to plaintiff Michael Sullivan (Compl. ¶113), which are the only alleged representations attributed to any of the Individual Defendants, Sullivan is not suing on those representations. The complaint only claims Sullivan was defrauded with respect to alleged BFF franchise misrepresentations. (Compl. ¶186.) There is no allegation that Roquet made any representations about the BFF program to Sullivan. Regardless, even if Sullivan based his claim on Roquet's alleged representations, his claim is time-barred and fails under the parol evidence rule, as discussed below.

2. Plaintiffs Fail To Properly Allege *Scienter* Under Rule 8(a)

Plaintiffs' fraud claim also fails because they do not adequately allege the Individual Defendants' *scienter*.

Although Rule 9(b) allows conditions of a person's mind to be alleged generally, "nothing in the Federal Rules of Civil Procedure relieves a plaintiff of the obligation to set forth facts from which an inference of *scienter* could be drawn." *Oestreicher v. Alienware Corp.*, 544 F.Supp.2d 964, 968 (N.D. Cal. 2008) (citing *Cooper v. Pickett*, 137 F.3d 616, 628 (9th Cir.1997)). In *Iqbal*, the Supreme Court affirmed that in pleading a state of mind, the plaintiff is required to allege facts showing a plausible inference for such mental state:

Rule 9 merely excuses a party from pleading [state of mind] under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

Iqbal, 129 S.Ct. at 1954 (alterations and internal citations omitted).

Thus, dismissal of a fraud claim is warranted where no facts are alleged that support the inference of knowledge or intent. For example, in *Iqbal*, the Court found conclusory allegations of mental state to be inadequate. *Iqbal* considered if the plaintiff adequately pled discriminatory purpose in his *Bivens* claim related to

1 alleged abusive and discriminatory treatment at a prison. The plaintiff pled the
 2 element by stating defendants “‘knew of, condoned, and willfully and maliciously
 3 agreed to subject [him]’ to harsh conditions of confinement [] ‘solely on account of
 4 [his] religion, race, and/or national origin.’” *Iqbal*, 129 S.Ct. at 1951, 1954. The
 5 Court rejected the allegation, finding it was a conclusion not entitled to a
 6 presumption of truth. *Id.* at 1954. *See also Swartz*, 476 F.3d at 765; *Neubronner v.*
 7 *Milken*, 6 F.3d 666, 672 (9th Cir. 1993).

8 Here, with respect to Roquet’s supposed representations (to the extent
 9 plaintiffs Sullivan sues on them), Plaintiffs allege only the conclusion that Roquet
 10 “knew these statements to be false.” (Compl. ¶114.) Plaintiffs do not allege
 11 Roquet’s fraudulent intent. And, in any event, their allegation of knowledge of
 12 falsity is conclusory and deficient.

13 Otherwise, Plaintiffs make no factual allegation showing the Individual
 14 Defendants’ *scienter*. Plaintiffs make allegations against all Defendants
 15 collectively, and in that regard only plead the conclusion that Defendants acted
 16 knowingly and intentionally. (Compl. ¶186, ls. 24-25; ¶187, ls. 18-20.) Such
 17 conclusory allegations, even if they could be attributed to each Individual
 18 Defendant, are not assumed to be true. *Iqbal*, 129 S.Ct. at 1950. Plaintiffs have
 19 failed to plead any facts showing Roquet’s or any other Individual Defendant’s
 20 *scienter*.

21 **3. Under The Agent Immunity Rule The Individual** 22 **Defendants Cannot Be Liable For Conspiring To Commit** **Fraud With Their Employer**

23 Under the agent immunity rule, the Individual Defendants cannot be held
 24 liable for conspiring with their corporate principal or employer to commit fraud.
 25 *Rachford v. Air Line Pilots Association*, 2006 WL 1699578, *6 (N.D. Cal. June 16,
 26 2007); *see also Icasiano v. Allstate Ins. Co.*, 103 F. Supp.2d 1187, 1192 (N.D. Cal.
 27 2000). There is no liability for individual employees who do not create corporate
 28 policy. *Black v. Bank of America*, 30 Cal.App.4th 1, 6 n. 4 (1995). There are no

1 allegations that the Individual Defendants created corporate policy with respect to
2 the alleged rebates. Nor are there any grounds to assert such an allegation.

3 Thus, to the extent Plaintiffs contend the Individual Defendants conspired
4 with the corporate defendants (as is suggested by Plaintiffs' complaint, *see, e.g.*,
5 Compl. ¶¶32-35), to commit fraud, or any other tort or statutory violation, the
6 Individual Defendants are immune from liability.⁶

7 **4. Sullivan's Fraud Claim Against Roquet Would Be Time- 8 Barred**

9 In the event plaintiff Sullivan claims fraud based upon the alleged
10 representations made by Roquet, Sullivan's claim would be time-barred. The
11 alleged representations concerned future profit margins and a marketing and
12 support program. (Compl. ¶¶113.) The complaint vaguely claims that Sullivan
13 was told Big O would "net between 9 to 10 percent after paying the owner a
14 working manager's salary." (*Id.*) It further claims that Roquet misrepresented that
15 "Big O's Northern California Trust [] was an organization designed to assist
16 franchisees in the areas of store marketing and accounting, that all franchisees'
17 marketing needs would be met by the trust, and that all franchisees' received the
18 same amount and quality of marketing support." (*Id.*)

19 ⁶ Plaintiffs also cannot rely upon their conclusory statement that the Individual
20 Defendants acted for their own individual financial benefit (Compl. ¶29) to
21 overcome the agent immunity rule, assuming for the sake of argument such
22 allegations pass muster under *Twombly* and *Iqbal*. "Every agent, in one way or
23 another, acts for its own financial advantage when it acts for its principal, and
24 conduct in furtherance of the principal's interest will necessarily serve the agent's
25 interests as well." *Mintz v. Blue Cross of California* 172 Cal.App.4th 1594, 1606
26 (2009). Cases therefore interpret "financial advantage" to mean "a personal
27 advantage or gain that is over and above ordinary professional fees earned as
28 compensation for performance of the agency." *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.*, 131 Cal.App.4th 802, 834 (2005) (emphasis added). It is not enough to show that the Individual Defendants received a bonus or commission for their work. *Hanni v. Am. Airlines, Inc.*, 2008 WL 5000237, *4 (N.D. Cal. Nov. 1, 2008) ("[B]onuses are not independent pecuniary gain because they are part of the compensation earned by employees . . ."). Plaintiffs have failed to sufficiently allege or establish that the Individual Defendants received any personal financial advantage from their alleged conduct. In fact, their pleading is entirely inconsistent as they allege that the Individual Defendants were acting for the financial advantage of their employer and were "acting within the course, scope and authority of said [employment] positions." (Compl. ¶¶29, 33.)

1 Plaintiffs allege, however, that Roquet made these representations to
2 Sullivan at some unspecified time before *May 2001*, when Sullivan executed an
3 agreement to run a franchise in Oakhurst, California. (Compl. ¶¶112, 113.) This
4 was nine years ago. The statute of limitations for a claim of fraud is three years.
5 Cal. Code of Civ. Pro. § 338(d). Surely, Sullivan knew, or should have known, by
6 December 2006, three years before the complaint was filed, whether the alleged
7 profit margins had been realized or marketing and other assistance had been
8 provided.

9 **5. Sullivan's Fraud Claim Against Roquet Would Fail Under**
10 **The Parol Evidence Rule**

11 Additionally, any fraud claim premised on Roquet's representations fails
12 under the parol evidence rule.

13 California Civil Code section 1625 provides "[t]he execution of a contract in
14 writing, whether the law requires it to be written or not, supersedes all the
15 negotiations or stipulations concerning its matter which preceded or accompanied
16 the execution of the instrument." And here, the franchise agreement contains an
17 integration clause, that explicitly supersedes "any oral or written representations
18 which are inconsistent with the terms of [the agreement or offering circular]." (*Id.*
19 at § 31(g).)

20 Under the parol evidence rule, California Code Civil Procedure section
21 1856(a), "[t]erms set forth in a writing intended by the parties as a final expression
22 of their agreement with respect to such terms as are included therein may not be
23 contradicted by evidence or any prior agreement or of a contemporaneous oral
24 agreement." The parol evidence rule "prohibits the introduction of evidence
25 outside of the four corners of the written agreement to vary, alter or add to the
26 terms of an integrated written instrument." *Alling v. Universal Manufacturing*
27 *Corp.*, 5 Cal.App.4th 1412, 1433 (1992). The rule recognizes that, as a matter of
28 law, the writing is the entire agreement of the parties and "supersedes all the
negotiations or stipulations concerning its matter which preceded or accompanied

1 the execution of the instrument.” *BMW of North America, Inc. v. New Motor*
2 *Vehicle Board*, 162 Cal.App.3d 980, 990, n. 4 (1984); see *Tahoe National Bank v.*
3 *Phillips*, 4 Cal.3d 11, 23 (1971) (evidence of prior or contemporaneous
4 negotiations or agreements which are at variance with the written agreement
5 cannot create new obligations or alter the obligations set forth in the written
6 agreement).

7 The rule applies even to allegations of fraud. “[O]ur courts have
8 consistently rejected promissory fraud claims premised on prior or
9 contemporaneous statements at variance with the terms of a written integrated
10 agreement.” *Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 346 (2004). “[T]he
11 use of promissory fraud to invalidate an integrated agreement would nullify the
12 parol evidence rule.” *Pacific State Bank v. Greene*, 110 Cal.App.4th 375, 390
13 (2003). The parol evidence rule bars a plaintiff from attempting to show a false
14 promise with respect to a matter covered by the main agreement where the alleged
15 promise contradicts the terms of the agreement. See, e.g., *Wang v. Massey*
16 *Chevrolet*, 97 Cal.App.4th 856, 875, 876 (2002) (in action by automobile lessees
17 against lessor, alleging that defendant falsely represented that plaintiffs could
18 purchase vehicle soon after lease began and without penalty by paying specified
19 sum, parol evidence to that effect was inadmissible, where it was directly at
20 variance with terms of lease); *Green v. Del-Camp Inv.* 193 Cal.App.2d 479, 482
21 (1961) (“Where, as here, the claimed fraud consists of a false promise with respect
22 to a matter covered by the agreement itself, the oral evidence would contradict the
23 terms of the agreement, in direct contravention of the rule”).

24 Under the parol evidence rule, Sullivan would be unable to state a claim for
25 fraud upon representations directly contradicted by the terms of the agreement.
26 Thus, any claim for fraud based on representations of alleged future profits cannot
27 be maintained because it would contradict the express terms of the franchise
28 agreement. In particular, the express disclaimers of the making of “any warranty

1 or guaranty, express or implied, ... as to the potential volume, profit, income or
 2 success of the Franchised Business.” (Ex. A to Compl. at § 31(c); *see also* Ex. B
 3 to Compl. p. 78 (“**BIG O DOES NOT GUARANTEE THE SUCCESS OR**
 4 **PROFITABILITY OF YOUR STORE IN ANY MANNER**”); *id.* at p. 87 (Big
 5 O does “not furnish or authorize our salespersons to furnish to prospective
 6 franchisees in connection with the offer of franchises any oral, written, or visual
 7 representation from which a specific level or range of actual or potential sales,
 8 income, gross profits, or net profits of a Big O store or franchise, may be
 9 ascertained”).)

10 Any claim based on alleged representations related to the marketing program
 11 is also contradicted by the terms of the franchise agreement. Under the agreement,
 12 there was no obligation to ensure any franchisee benefits from the sums
 13 contributed for advertising. (*Id.* at §15.03(b).) And there was “no obligation to...
 14 enforce payments or contributions (in whole or in part) by other franchisees.” (*Id.*)

15 Furthermore, given the integration clause and the specific disclaimers,
 16 Sullivan, nor any other plaintiff, could not have reasonably relied on any contrary
 17 oral representation. It is well settled that a plaintiff is bound by clear and
 18 conspicuous provisions, even if he or she “did not read or understand them.” *See,*
 19 *e.g., Hadland v. NN Investors Life Ins. Co., Inc.*, 24 Cal.App.4th 1578, 1586
 20 (1994); *see also Aetna Casualty & Surety Co. v. Richmond*, 76 Cal.App.3d 645,
 21 652 (1977). Plaintiffs cannot justifiably rely on prior oral statements contrary to
 22 the written contract. *Hackenthal v. National Casualty Co.*, 189 Cal.App.3d 1102
 23 (1987) (no justifiable reliance in fraud claim based on alleged misrepresentations
 24 by insurance agent regarding policy, where plaintiff was on notice to read policy).

25 **D. Plaintiffs’ Negligent Misrepresentation Claim Should Be**
 26 **Dismissed**

27 Plaintiffs’ sixth claim for negligent misrepresentation should be dismissed
 28 because Plaintiffs fail to plead the claim properly; omit any allegation concerning
 Defendants’ intent; and premise the claim on non-actionable conduct.

1 **1. Plaintiffs Fail To Properly Plead The Claim**

2 Plaintiffs' negligent misrepresentation allegations exemplify the pleading
3 tactic condemned by the Supreme Court in *Twombly* and *Iqbal*. The pleading is
4 nothing more than a "formulaic recitation of the elements of a cause of action"
5 without any supporting facts. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S.
6 at 555, 557). Plaintiffs do not identify what misrepresentations they sue upon.
7 (Compl. ¶191.) They simply conclude Defendants made the unspecified
8 representations "without regard to their truth." (*Id.*) They similarly plead their
9 reliance, causation, and damages in conclusory fashion. (Compl. ¶¶192-96.)

10 **2. Plaintiffs Fail To Plead Intent To Induce Reliance**

11 Plaintiffs' negligent misrepresentation claim is also deficient because
12 Plaintiffs failed to allege any Individual Defendants' intent to induce Plaintiffs'
13 reliance on the alleged misrepresentations. (Compl. ¶¶190-96.) The element is
14 required. Jud. Coun. Of Cal. Civ. Jury Instr. 1903.

15 **3. Plaintiffs Cannot Premise Negligent Misrepresentation On Omissions Or Future Promises**

16 Plaintiffs contend Defendants negligently omitted material facts. (Compl.
17 ¶191.) Plaintiffs cannot state a claim for negligent misrepresentation on such a
18 theory because there is no such claim for negligent omission. *See, e.g., Byrum v.*
19 *Brand*, 219 Cal.App.3d 926, 942 (1990) *Shamsian v. Atlantic Richfield Co.*, 107
20 Cal.App.4th 967, 983-84 (2003). Further, to the extent Plaintiffs base their claim
21 on alleged misrepresentations of future events or promises, they cannot do so
22 because the tort requires that the representations concern *past* or *existing* facts.
23 *Shamsian*, 107 Cal.App.4th at 983; *Tarmann v. State Farm Mut. Auto. Ins. Co.*, 2
24 Cal.App.4th 153, 157, 159 (1991).

25 **E. Plaintiffs' Unfair Practices Act Claim Should Be Dismissed**

26 Plaintiffs' seventh claim for violation of the UPA should be dismissed
27 because the claim as asserted against the Individual Defendants is implausible, and
28 Plaintiffs have not competently alleged a required element of the claim.

1 **1. Plaintiffs' Claim Is Implausible**

2 Plaintiffs' UPA claim concerns alleged secret rebates to certain large
3 franchises, but the only factual allegation related to the charge concerns alleged
4 rebates to certain Northern California franchises. (Comp. ¶115.) Plaintiffs allege
5 no facts stating that the Individual Defendants personally gave any rebates to the
6 large franchises, or had any ability to effectuate such rebates. The rebates,
7 assuming for the sake of argument they were given, reflect corporate policy. It is
8 implausible that the Individual Defendants are the parties giving any rebates to the
9 large franchises.

10 Moreover, under the agent immunity rule, the Individual Defendants cannot
11 be held liable for conspiring with their corporate principal or employer to give
12 rebates. *Rachford*, 2006 WL 1699578 at *6; *Icasiano*, 103 F. Supp.2d at 1192.

13 **2. Plaintiffs Fail To Plead An Element Of Their Claim**

14 Even if Plaintiffs' failure to plead in conformity with Rule 8(a) could be
15 overlooked, Plaintiffs' UPA claim should be dismissed as they have not pled a
16 required element of the claim. Plaintiffs premise their claim on California
17 Business & Professions Code section 17045, which prohibits the secret payment of
18 rebates to certain purchasers but not to all purchasers "purchasing upon like terms
19 and conditions." Cal. Bus. & Prof. Code § 17045.

20 Plaintiffs, however, do not competently plead they purchase on "like terms
21 and conditions" as the larger franchises allegedly receiving the rebates. Plaintiff
22 only allege, on information and belief, that the larger franchises all purchase on
23 like terms and conditions as each other. (Compl. ¶213.) Regardless, Plaintiffs'
24 complaint shows that the various Big O franchises are not similarly situated.
25 Under the two-tiered franchise system Plaintiffs allege Big O uses, certain
26 franchises pay a higher percent franchise fee than others, but receive tires at a
27 cheaper price. (Compl. ¶¶39-40.) Thus, franchises under the two systems do not
28 purchase Big O products on "like terms and conditions." Given the presence of the

two-tiered system, Plaintiffs fail to allege facts showing that rebates were given to franchises that purchase on the same terms and conditions as Plaintiffs.

F. Plaintiffs' Claim For Negligent Hiring Should Be Dismissed

Plaintiffs' eighth claim for negligent hiring should be dismissed. As a matter of law it cannot be asserted against the Individual Defendants and is improperly pled under Federal Rule 8(a).

1. The Individual Defendants Are Not Employers

Only an employer may be held liable for negligent hiring. *Cabral v. County of Glenn*, 624 F.Supp.2d 1184, 1196 (E.D. Cal. 2009) ("In California, an employer can be held liable for negligent hiring if..."). Here, Plaintiffs do not allege that the Individual Defendants are "employers." On the contrary, the Individual Defendants are alleged to be employees of the corporate defendants. (Compl. ¶29.)

2. Plaintiffs Fail To Properly Plead Their Claim

Like the rest of Plaintiffs' claims, their negligent hiring claim is inadequately pled as Plaintiffs state nothing more than a rote recitation of the elements of the cause of action. *Iqbal*, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 557). Plaintiffs also do not allege facts from which Defendants' knowledge that any employee lacked fitness could be inferred. Knowledge is an element of the claim for negligent hiring. *Cabral*, 624 F.Supp.2d at 1196. Plaintiffs' failure to plead supporting facts further dooms their claim. *See, e.g., Iqbal*, 129 S.Ct. at 1954.

G. Plaintiffs' Cartwright Act Claim Should Be Dismissed

Plaintiffs' ninth claim for violation of the Cartwright Act should be dismissed, because Defendants could not have formed a trust under the Act, and the Individual Defendants cannot be liable under the agent immunity rule for conspiring with their employer.

1. Defendants Cannot Form A "Trust" Under The Cartwright Act As A Matter Of Law

The Cartwright Act makes unlawful a "trust," defined as a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations, or

1 associations of persons to restrict trade, limit production, increase or fix prices, or
2 prevent competition. Cal. Bus. & Prof. Code §§ 16702, 16720, 16726.

3 Plaintiffs do not plead the existence of a cognizable “trust” under the
4 Cartwright Act. Plaintiffs premise their claim on the formation of a “trust” among
5 each defendant, which comprise affiliated companies or employees of those
6 companies. (Compl. ¶¶26-29.)

7 Under the Act, however, only individuals or entities maintaining separate
8 and independent interests can form a trust. *Bondi v. Jewels by Edwar, Ltd.*, 267
9 Cal.App.2d 672, 678 (1968) (the Cartwright Act “contemplates concert of action
10 by separate individuals or entities maintaining separate and independent
11 interests”). A complaint alleging a trust among employees and their employer does
12 not state a claim under the Act. *Id.* at 677-78 (allegations that defendant
13 corporation entered into a combination with its employees stated no cause of action
14 under the Cartwright Act). Further, the Individual Defendants cannot be held
15 liable under the agent immunity rule for conspiring with the corporate defendants.
16 *Rachford*, 2006 WL 1699578 at *6; *Icasiano*, 103 F. Supp.2d at 1192.

17 **H. Plaintiffs’ Unfair Competition Law Claim Should Be Dismissed**

18 Plaintiffs’ tenth claim for violation of the UCL should be dismissed because
19 Plaintiffs lack standing to maintain the claim and improperly plead the claim.

20 **1. Plaintiffs Lack Standing To Bring Their UCL Claim**

21 To have standing to assert a UCL claim, a plaintiff must “ha[ve] suffered
22 injury in fact and ha[ve] lost money or property as a result of the unfair
23 competition.” Bus. & Pro. Code § 17204; *Consumer Advocacy Group, Inc. v.*
24 *Kintetsu Enterprises of America*, 150 Cal.App.4th 953 (2007). The loss of money
25 or property required for UCL standing must be money or property that can be
26 subject to an order of restitution under section 17203 of the UCL. *Buckland v.*
27 *Threshold Enterprises, Ltd.*, 155 Cal.App.4th 798, 817 (2007); *Walker v. USAA*
28 *Cas. Ins. Co.*, 474 F.Supp.2d 1168, 1172 (E.D. Cal. 2007).

Plaintiffs have not included competent allegations of their loss of money or

1 property that could be subject to an order of restitution against any of the
 2 Individual Defendants. Indeed, Plaintiffs offer no facts supporting their standing.
 3 Plaintiffs simply plead verbatim the statutory language requiring standing.
 4 (Compl. ¶234.) Under *Twombly* and *Iqbal* such an allegation is insufficient.

5 Further, the complaint does not otherwise allege facts or articulate any
 6 theory for Plaintiffs' entitlement to restitution from the Individual Defendants. In
 7 particular, Plaintiffs make no allegation that they parted with any money of
 8 property to any of the Individual Defendants that the Individual Defendants can be
 9 ordered to restore to Plaintiffs. The only alleged sums given by Plaintiffs were
 10 fees under the franchise agreement Plaintiffs have with Big O. Assuming for the
 11 sake of argument that such money could properly be subject to restitution,
 12 Plaintiffs did not give the money to the Individual Defendants. Thus, the
 13 Individual Defendants cannot be ordered to return it to Plaintiffs.

14 **2. Plaintiffs Improperly Plead Their UCL Claim**

15 Plaintiffs again fail to differentiate among Defendants in pleading their UCL
 16 claim. They improperly lump all Defendants together in violation of Rule 8(a).
 17 See, e.g., *Levine v. Diamantheset, Inc.*, 722 F.Supp. 579, 590 (N.D. Cal. 1990)
 18 (dismissing UCL claim where the plaintiffs "lump all the defendants together" and
 19 "pile up unnecessary and perhaps inapplicable claims") *rev'd on other grounds by*
 20 950 F.2d 1478 (9th. Cir. 1991). This failure is symptomatic of Plaintiffs' general
 21 failure to plead the claim with detail. A plaintiff must plead with particularity the
 22 facts supporting a UCL claim. *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983
 23 F.Supp. 1303, 1316 (N.D. Cal. 1997) (citing *Khoury v. Maly's of California*, 14
 24 Cal.App.4th 612, 619 (1993)).

25 Here, Plaintiffs rely on conclusions of wrongdoing, but include no factual
 26 details. For example, Plaintiffs accuse Defendants of fraudulent conduct but
 27 provide no details, such as who made any alleged misrepresentation, to whom they
 28 were made, or when they were made. (Compl. ¶¶240-41.)

1 Plaintiffs claim Defendants acted unlawfully but do not identify any statutes
2 or regulations that Defendants' purportedly violated. (*Id.* ¶¶236-37.) Further, to
3 the extent Plaintiffs base their UCL claim on other claims asserted by Plaintiffs,
4 the failure of those other claims extinguishes their UCL claim. *See, e.g., Silicon*
5 *Knights*, 983 F.Supp. at 1316 ("Since most of Plaintiff's causes of action fail to
6 state claims for relief... there is no underlying basis for the unfair competition
7 claims"); *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 866 (2001) (UCL claim
8 properly dismissed because plaintiff failed to show existence of conspiracy, which
9 was element of underlying antitrust claim upon which UCL claim was based).

10 Plaintiffs also allege Defendants acted "unfairly by not ensuring that
11 franchisees contribute to the advertising fund for the collective good of
12 franchisees." (Compl. ¶239.) Initially, Plaintiffs make no allegation that the
13 Individual Defendants had any obligation or ability to ensure franchisees
14 contributed to any advertising fund. Thus, the UCL claim against the Individual
15 Defendants cannot be based on such conduct. Regardless, the franchise agreement
16 provides that "Big O has *no obligation to Franchisee* to enforce payments or
17 contributions (in whole or in part) by other franchisees." (Ex. A to Compl. §
18 15.03(b) (emphasis added)).

19 The Plaintiffs further allege Defendants acted unfairly "by not providing
20 competitively priced tires to Plaintiffs, while providing tires to others at lower
21 prices." (Compl. ¶238.) Again, Plaintiffs make no allegation that the Individual
22 Defendants had any obligation to provide tires to Plaintiffs, and thus cannot base
23 their claim against the Individual Defendants upon such an obligation. The
24 obligation to provide tires to Plaintiffs rested with Big O. Those parties agreed that
25 Big O had no obligation to provide tires at prices on par with prices it provided to
26 other franchises. The franchise agreement disclosed the unequal pricing scheme
27 for Big O's two franchise models and Plaintiffs freely chose to purchase its
28 franchise with knowledge of that condition. (Ex. A to Compl. § 32(h).)

1 “An ‘unfair’ business practice occurs when it offends an established public
2 policy or when the practice is immoral, unethical, oppressive, unscrupulous or
3 substantially injurious to consumers.” *Spiegler v. Home Depot U.S.A., Inc.*, 552 F.
4 Supp. 2d 1036, 1045 (C.D. Cal. 2008). “Although the unfair competition law is
5 sweeping, it is not unlimited. Courts may not simply impose their own notions of
6 the day as to what is fair or unfair.” *Cel-Tech Communications, Inc. v. Los*
7 *Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 182 (1999). Alleged conduct by
8 Big O that it consistent with what Plaintiffs agreed to is not in violation of public
9 policy, or immoral, unethical, oppressive, unscrupulous or substantially injurious
10 to consumers. *See, e.g., Spiegler*, 552 F. Supp. 2d at 1046 (“UCL cannot be used
11 to rewrite... contracts or to determine whether the terms of... contracts are fair).

12 Regardless, Plaintiffs’ allegations under the unfairness prong of the UCL
13 merely re-state Plaintiffs’ contractual grievances. This cannot form the basis for a
14 UCL claim, particularly where the Individual Defendants are not parties to the
15 contracts and have no contractual obligations to Plaintiffs. *Berryman v. Merit*
16 *Property Management, Inc.*, 152 Cal.App.4th 1544, 1555 (2007) (“plaintiffs cannot
17 bootstrap a claim for breach of contract-which, [] they are not allowed to bring-
18 onto a UCL claim”). Further, as Plaintiffs’ breach of contract claim should be
19 dismissed, so should its UCL claims predicated on the contracts. *Van Ness v. Blue*
20 *Cross of Cal.*, 87 Cal.App.4th 364, 376 (2001); *Whiteside v. Tenet Healthcare*
21 *Corp.*, 101 Cal.App.4th 693, 706 (2002).

22 Finally, Plaintiffs fail to plead their lack of adequate legal remedies. “A
23 UCL action is equitable in nature.” *Korea Suppl.*, 29 Cal.4th at 1144. The
24 remedies available under the UCL – restitution and injunctive relief – are
25 equitable. *See, e.g., Dean Witter Reynolds, Inc. v. Sup. Ct.*, 211 Cal.App.3d 758,
26 774 (1989); 5 Witkin, CAL. PROC. 4TH (2009) PLEAD., § 822. A party cannot
27 maintain equitable claims if there is an adequate remedy at law. *See, e.g.,* 13
28 Witkin, SUMMARY 10TH (2009) EQUITY, § 3. Thus, an essential element of the

1 claim that must be pled is that the “plaintiff has no adequate remedy at law”.
2 *Heighley v. J.C. Penney Life Ins. Co.*, 257 F.Supp.2d 1241, 1259-60 (C.D. Cal.
3 2003) (finding plaintiff “failed to properly allege claims for relief under” the UCL
4 where plaintiff failed to plead he had no adequate remedy at law). Here, Plaintiffs
5 do not allege they lack adequate legal remedies.

6 **V. CONCLUSION**

7 The Individual Defendants respectfully request that the Court grant their
8 motion to dismiss.

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Respectfully submitted,
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